United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF FOR REHEARING EN BANC

ORIGINAL

76-6049-50-59

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

CITY OF HARTFORD, on behalf of itself and its inhabitants, Richard Brown, Nicholas R. Carbone, John Cunnane, William A. DiBella, Allyn A. Martin, Richard Suisman, Margaret V. Tedone and Olga W. Thompson in their official capacity, Miriam Jordan and Fannie Mauldin,

Plaintiffs-Appellees,

vs.

The TOWNS OF GLASTONBURY, WEST HARTFORD and EAST HARTFORD,

Defendants-Appellants,

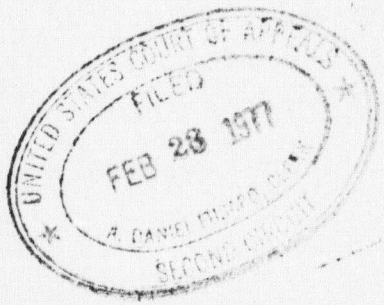
and

CARLA A. HILLS, in her capacity as Secretary of the Department of Housing and Urban Development; HAROLD G. THOMPSON, in his capacity as Acting Regional Administrator of the Department of Housing & Urban Development; LA[illegible]CE THOMPSON, in his capacity as District Director of the Department of [illegible]g and Urban Development; and THE DEPARTMENT OF HOUSING AND U[illegible]AN DEVELOPMENT and the Towns of FARMINGTON, WINDSOR LOCKS, VERNON, and ENFIELD,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

JOINT BRIEF OF DEFENDANTS-APPELLANTS ON REHEARING *EN BANC*



RALPH G. ELLIOT
Attorney for Defendant-Appellant
Town of Glastonbury
One American Row
Hartford, Connecticut 06103

JOHN J. LANGENBACH
Attorney for Defendant-Appellant
Town of West Hartford
Town Hall
West Hartford, Connecticut 06107

JAMES A. WADE
Attorney for Defendant-Appellant
Town of East Hartford
799 Main Street
Hartford, Connecticut 06103

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Incorporation of Appellants' Previous Brief

Prior to argument before the panel in this matter last fall appellants filed a joint brief on all issues common to them, including all issues hereinafter specifically discussed. They understand that that brief will be read and considered by this Court on rehearing, and therefore they will refrain from repeating here much of what they have stated there. That earlier brief is hereby incorporated by reference into this brief.

Statement of the Issue

The issue addressed in this brief on rehearing is:

Did the plaintiffs City of Hartford, Mauldin and Jordan have standing to bring this suit?

Statement of the Facts

While the facts of this case have been set forth at length in appellants' main brief, it might be helpful if they were briefly summarized here.

On August 22, 1974, Congress enacted what came to be known as the Housing and Community Development Act of 1974 (hereinafter, "the Act"). This suit deals with a dispute arising out of applications for funds made pursuant to Title I of that Act, 42 U.S.C. §§ 5301-5317, entitled "Community Development". The funds provided under this Title could be used for a wide range of community development activities. Significantly, however, *the construction of low or moderate income housing was not an eligible activity.* Another significant feature of the Act

was its return to the individual communities of responsibility for ascertaining their own local needs and devising programs to meet them on a local level.

One aspect of this program was to be the Housing Assistance Plan, drawn up by the applicant town as part of its application. 42 U.S.C. § 5304(a)(4). The particular portion of that provision which is the focus of this suit is the "expected to reside" computation set forth in 42 U.S.C. § 5304(a)(4)(A), wherein the applicant was required to submit a plan which

> (A) accurately surveys the condition of the housing stock in the community and assesses the housing assistance needs of lower-income persons (including elderly and handicapped persons, large families, and persons displaced or to be displaced) residing in *or expected to reside* in the community. (emphasis supplied)

This "expected to reside" category was an innovation of the Act. Its intent is best expressed in the Report of the House Committee on Banking and Currency (page 3a of the Addendum to the main brief):

> Clearly, those already employed in the community can be expected to reside there. Normally, estimates of those expected to reside in a particular community would be based on employment data generally available to the community and to HUD. However, in many cases, communities should be able to take into account planned employment facilities as well, and their housing assistance plans should reflect the additional housing needs that will result.

"Lower income persons" were defined in HUD's Instructions for completing the application (Appendix, page A337) as "families whose income does not exceed 80 percent of median income for the area, with adjustments upward or downward for larger or smaller families, or

other limits established by HUD because of construction cost levels or for other reasons".

The "expected to reside" feature reflected the premise of the Act that people like to live in the same town where they work. Hence, the Act established a statutory presumption that those "lower income persons" who work in a given town must be "expected to reside" there, and the town should devise its community development projects with them in mind.

There is no allegation in the case that the towns did anything but what HUD told them to do. They (including Hartford) submitted their applications and those applications began the detailed processing route for such applications. As HUD began processing these applications in the spring of 1975, however, it became apparent that in the six or eight months since enactment of this innovative "expected to reside" concept, both HUD and the communities across the United States lacked the data or the methodology to compute meaningful, intelligent figures.

Accordingly, on May 21, 1975, Assistant HUD Secretary David O. Meeker issued what has since been called the "Meeker Memorandum", which is set forth in the Appendix at A139. This memorandum, among other things, permitted applicants to submit and have accepted for HUD processing first-year applications without any "expected to reside" computation upon the applicant's indication of what steps the applicant intended to take to identify a more appropriate needs figure with its second-year application (the Act contemplated three one-year applications). HUD's Hartford office determined that for Connecticut there was insufficient data for HUD to compute meaningful "expected to reside" figures for Connecticut towns. Accordingly, both Hartford and the defendant towns submitted "0" figures (except for East Hartford, which had submitted its application before issuance of the Meeker Memorandum and had included an "expected to reside" figure of 131).

The applications were processed, they were approved, and the plaintiffs sued HUD because the towns had not included any "expected to reside" figures (except for East Hartford, whose figure of 131 plaintiffs disputed as inadequate).

ARGUMENT

These Plaintiffs Lack Standing To Bring This Suit

Appellants in their main brief have more fully set forth their argument on plaintiffs' lack of standing, including the law against which that must be judged. They will therefore not repeat here much of what they have set forth there, but will confine themselves primarily to matters that appear to have been factors in the panel majority's decision and to case law decided since that time.

At the outset, however, one plain and unblinkable fact must be stated clearly and surely. The most recent and thorough expression of the law of standing in this Circuit was stated by this Court last June in *Evans* v. *Lynn*, 537 F. 2d 589 (CA-2; 1976), cert. den. 45 U.S.L.W. 3489 (1/18/77). That decision and the opinion of the trial court in this case cannot logically coexist. If the decision below in this case is to be affirmed, *Evans* v. *Lynn* must be overruled. For since the facts of that case—compelling as they did the special attention and protection traditionally accorded allegations of racial discrimination—were deemed insufficient to confer standing on plaintiffs even at the procedural stage of a motion to dismiss, where all allegations of material facts must be construed in plaintiffs' favor, how much less grounds there must be in this case, where there were no allegations of racial discrimination and where plaintiffs had their case tried on the merits to judgment, and were afforded every opportunity to adduce evidence to support their allegations of standing (which defendants denied), and produced none.

In order to place the issue of plaintiffs' standing in better perspective, it is appropriate to ask: what relief did plaintiffs seek?

A. The Relief Plaintiffs Sought

The plaintiffs in this case did not seek the reallocation of defendants' funds to Hartford. Plaintiffs did not need any more money. Hartford had already been granted over $10,000,000 under this same Act, filing the same kind of application as did the defendants, with the same "0" expected to reside figure.

Hartford's interest, therefore, was not in shifting more funds to Hartford. Hartford wanted the towns to have the money, but to use it only in ways Hartford approved. Hartford thus wanted to control the use by its neighbor towns of funds they received from HUD. That was somehow considered to serve Hartford's purposes better than having the money to spend in Hartford itself. The situation thus is remarkably similar to that which this Court found to be so in *Evans,* at 598: "[plaintiffs] are invoking the Court's jurisdiction *solely* to impose upon the [defendants] priorities which the [plaintiffs] favor."

Consistent with that desire, therefore, the relief plaintiffs sought was that the Court "preliminarily and permanently enjoin the defendants [HUD and its personnel, the only defendants plaintiffs sued; HUD brought in the towns as additional parties defendant] from disbursing or transferring any funds pursuant to the seven grant applications heretofore set forth until such time as said communities submit to the defendants appropriate documents indicating compliance with the provisions of 42 U.S.C. 5301, 42 U.S.C. 3608(d)(5), 42 U.S.C. 2000(d)" Appendix, A 26-27.

Based upon that prayer for relief, we turn to the question of what benefits *plaintiffs*—these particular plaintiffs—could hope to derive from this suit. How *personally*

have *these* plaintiffs been injured by what each of the defendants has done? What is the connection between the injury plaintiffs demonstrate (if any) and the infractions (if any) of these defendants? Have plaintiffs demonstrated, at their trial on the merits, that absent these infractions by defendants they would not have suffered these particular, concrete, personal injuries? How, given the relief they seek in their complaint, will the City of Hartford and the two individual plaintiffs be benefited "in a tangible way from the court's intervention"? *Warth* v. *Seldin,* 422 U.S. 490, 508 (1975).

B. What Tangible Benefits Might Hartford Receive?

1. If The Towns Altered Their "Expected To Reside" Figures

If the seven towns were now to alter their "expected to reside" figures, how would the plaintiff City of Hartford be benefited in a tangible way? It must be recalled that the "expected to reside" figure is an estimate of the number of lower income people (as defined in HUD regulations) who *now work* or because of planned employment facilities will *probably be working* in town, a percentage of whom would be "expected to reside" in the town where they work. It must also be remembered that the purpose of that figure is not to set the floor for the number of of homes that will be built in town, for those jobs might not materialize and therefore these people would no longer be "expected to reside" in town under the Act. It must also be remembered that no part of these Title I funds may be used to build housing. These funds may only be used for community development purposes; and the "expected to reside" figure is but one part of a housing assistance plan component designed to estimate the number and type of people the town must keep in mind in devising its community development plans, so as to ensure that these plans will be of maximum benefit to these people when, as and if they move into town (or remain in town, if already there).

Thus, first of all, if as plaintiffs prayed for in their complaint the towns amended their applications and included "expected to reside" figures satisfactory to Hartford, Hartford would have successfully foreclosed the possibility that *it* would get any more funds from HUD through reallocation. If the Court granted Hartford the relief it sought, Hartford would get no money.

Second, if the towns amended their applications as Hartford wants, it would not cause the slightest increase in or improvement of the housing stock of Hartford.

Third, it would not necessarily cause any decline in Hartford's expenditures for welfare or for housing subsidies. In the first place, no new housing would be built in the towns with this Title I money; that would be illegal. In the second place, the "expected to reside" estimate is just that—an estimate for community development planning purposes—and does not commit the town in the future to build that number of houses. Indeed, as recent economic history all too starkly reveals, were the planned employment facilities on which the figure was based suddenly to evaporate and companies decide not to build or expand, those "expected to reside" under the Act would no longer be expected to do so because they would have no jobs inducing them under the Act to move into town; and hence, presumably, the housing would not be built.

Assuming, however, that housing is built, jobs materialize, and the "expected to reside" figure becomes converted in time into a "new residents" figure, that presumably would have no effect (at least none demonstrated at trial) on Hartford's welfare or housing subsidy rolls. For by definition those who have moved from Hartford to the neighboring town where they work have *jobs* there. If they have jobs, if they are employed, *that* fact, and not the sites of their homes, would presumably remove them from the welfare and housing subsidy rolls; so that even if they continued to live in Hartford their employment status

would be the determining factor, not that they were "expected to reside" elsewhere.

Even if these persons, though employed, did receive city welfare and city housing subsidies, there is no reason (and no evidence at trial) to conclude that their departure to neighboring towns would decrease the city rolls unless it can be found (and there was no evidence of this, either) that their places will not be taken by new births; by the natural inward migration of lower income people into Hartford to fill vacated premises; and, significantly, by the movement *into* Hartford of lower income people who *work* in Hartford and therefore, under the Act, would be "expected to reside" in Hartford. For "expected to reside" is not a one-way street running out of Hartford. The Act was not designed as an invitation to mass emigration from Hartford . It was premised on the job connection—that lower income people probably want to live where they *work.* And if they work in Hartford—at its large new Civic Center complex, or its new federal post office on Interstate 91, or at its new regional American Airlines office, or as a result of the residency ordinances requiring municipal employees to live in Hartford—they presumably must be "expected to reside" in Hartford, and Hartford under the Act must provide for them.

To say that Hartford's welfare and housing subsidy rolls would decline is also to assume (and there was no evidence of this, either) that the "expected to reside" figures for the neighboring towns would in fact consist of Hartford residents, and those now on city welfare or housing subsidies at that, as contrasted with the distinct possibility that many of these people would be drawn from Willimantic, Bristol, Middletown, and other cities near these neighboring towns.

And finally, if the towns amended their applications, that would have no tangible, demonstrable effect on the nature, quality or number of community development projects Hartford would plan with its ten million dollars.

2. If HUD Had Rejected The Original Applications

Passing over the plaintiffs' limited prayer for relief and *Warth's* test of standing that plaintiffs must show a tangible personal benefit *from the court's granting of that relief*, it has been suggested in this case that Hartford was "injured in fact" because had HUD *originally* rejected the towns' applications, their funds would have been reallocable and Hartford *might* successfully have applied; and that that, if so, satisfies Hartford's standing.

This suggestion flies squarely in the face both of *Warth*, as set forth above, and of certain uncontested facts. Much of this is discussed in the main brief in greater detail, but can briefly be summarized as follows:

First, HUD *could not* have denied the applications because they were filed in accordance with its own instructions. All it could have done was to rescind those instructions and ask the towns to resubmit their applications. *That* would not have made the funds reallocable. Even the District Court found the towns merely to have accepted an option HUD gave them; *HUD* was found to be at fault, not the towns. The fault was its granting of the option in the first place.

Second, nowhere in its complaint does Hartford claim it wants the money to be reallocated. Its prayer for relief does *not* seek rescission of the grants to the towns, thus arguably making the funds reallocable. Hartford wants the *towns* to have the funds, but after making "proper" application and for purposes approved by Hartford. Thus, the very relief Hartford prays for in the complaint eliminates the possibility that the funds will be reallocable, and gives point to this Court's observation in *Evans* that "The link between the ill allegedly suffered and the remedy requested is so tenuous as to approach the non-existent". *Id.*, at 595.

Thirdly, reallocated funds could only be used for "urgent needs" as defined in HUD regulations, and Hartford never

has alleged or shown it has *any* such needs so as to be eligible for reallocation. Indeed, the belated June, 1976, "feeler" for funds reprinted in the addendum of HUD's amicus brief, and HUD's indication of disapproval, is ample demonstration that no such needs exist.

Fourth, there is no support in statute or regulation for the panel's surmise (Slip Op. 1092) that towns that had not filed original fund applications would not be eligible for reallocation of funds, so that Hartford's priority would be enhanced.

Fifth, the Court ignores the uncontroverted testimony of the defendant Area Director that Hartford by law was—in September, 1975—already too late to apply for reallocated funds.

Thus, the plaintiffs' prayer for relief which eliminates the precondition for reallocation *plus* the absence of the prerequisite "urgent needs" *plus* the time bar of the regulations places Hartford squarely in the situation noted by this Court in *Evans*—and indeed, in a worse position:

> They claim only that, had the grants not been approved, the monies could conceivably have gone to some other, *totally imaginary* project in the County which *might* have had the result of making more housing available to them. *Id.* at 595.

Here, the possibility of reallocation (especially in light of the prayer for relief) is even less conceivable, and the "urgent needs" are no less "totally imaginary." And this being so, there is no way, either, that the *individual* plaintiffs could gain standing on this quicksand base for "tangible benefits" from reallocation (Cf. Slip Op. 1098). There is not a scintilla of evidence in the record to support it.

3. If The Towns Fail To Amend Their Applications

Much the same arguments compel rejection of the idea that the towns' failure to amend their applications would create some tangible benefit to the City of Hartford. The *failure* of the towns to amend would deny Hartford the one thing its prayer for relief sought: to compel the towns to take HUD money and use it as Hartford chose. There could be no clearer indication that this was Hartford's goal and purpose than that it eschewed seeking the relief one would naturally have expected: a court order rescinding HUD's approval, declaring the town's funds forfeit, and ordering reallocation of those funds among applicants. That Hartford belatedly indicates a willingness, if all else fails, to consider applying for these funds if they become available is, in light of its purpose and prayer for relief, hardly the stuff that standing is made of.

Also, as mentioned above, Hartford would be competing with many other towns (see Addendum to main brief, page 9a) in the SMSA for those reallocable funds—even assuming that its failure to apply by September of 1975 as other towns had did not bar its application for these first year funds—and would be limited in the uses to which it could put those funds to "urgent needs" as defined in HUD regulations (see Addendum to main brief pages 13a-14a). There was no claim in the complaint or evidence at trial that Hartford had any such "urgent needs". Indeed, as noted above, Hartford's belated June, 1976 "feeler" for funds, reprinted in the addendum of HUD's amicus brief, and HUD's indication of disapproval, is ample demonstration that no such needs exist.

C. No Evidence To Support Standing

Thus, the record in this case is devoid of a scintilla of evidence to support the theory that the City of Hartford suffered any personal injury resulting in any concrete, demonstrable way from HUD's or the towns' alleged

statutory infractions. Such problems as Hartford may have, in common with many other American cities, long antedated the applications of these towns, or even the passage of the Act. There is no evidence that but for the towns' failure to include a different "expected to reside" figure, Hartford's lot would be any different. There is no evidence that the court's intervention would personally benefit Hartford in any tangible way. And clearly, of course, Hartford cannot sue as *parens patriae*. See, e.g., *Com. of Pa., by Shapp* v. *Kleppe*, 533 F. 2d 668 (D.C. Cir.; 1976), cert. den., 45 U.S.L.W. 3396 (Nov. 30, 1976); and *California* v. *Auto Manufacturers Association, Inc.* (*In Re Multidistrict Vehicle Air Pollution M. D.L. No. 31*), 481 F. 2d 122, 131 (CA-9; 1973), cert. den. 414 U.S. 1045 (1973).

Thus, in this case that went to a full trial on the merits, plaintiffs have completely failed to satisfy their burden of proving Hartford has standing. Unless this Court is to overrule *Evans* v. *Lynn*, or unless this court intends to carve out an exception in this case to the rule requiring a plaintiff to sustain the burden of proving it has standing, no facts and no law exist to support Hartford's standing in this case.

D. The Individual Plaintiffs

In light of the foregoing, the discussion of the standing of Mrs. Jordan and Mrs. Mauldin may be much briefer. For clearly, the suggestion that these individual Hartford residents might derive "tangible benefits" from reallocation of funds to Hartford is infected with the same infirmity as the suggestion that Hartford could gain standing in that way. We have demonstrated above that factually, legally and logically the notion is chimerical and will not withstand scrutiny.

As for other grounds of standing, there are none. These two women do not work in the three defendant towns and do not claim they do or ever will. They would thus not be among those includible in the "expected to reside" category

of any of these towns' applications. If the applications were amended, it would have no effect on these plaintiffs, for they would neither be working nor living in the towns where the community development projects would be built. If the applications are not amended and the towns proceed under their original plans, it will equally have no effect on these plaintiffs, who will not be working or living there. Indeed, while it has almost automatically been stated that these plaintiffs live in substandard housing in Hartford, the record is barren of any claim or evidence as to the quality of plaintiffs' present housing. Plaintiff Jordan had been living in Hartford since well before enactment of the Act. Plaintiff Mauldin moved to Hartford a month before the Meeker Memorandum was issued permitting the towns to do what they did, and she moved to Hartford for family reasons totally unconnected with the Act or the defendants. These plaintiffs do not even allege that they would like to live in or work in or visit the defendant towns—even if such desires were relevant under the Act, which they are not.

Thus, their position is no different from that of appellants in *Evans* v. *Lynn* (at 590):

> [They] do not reside in the Town. They make no claim that they have ever sought or been refused housing in the Town. They have no interest in any Town property, or connection with any past or proposed housing project in the Town. They do not allege that either of the challenged projects will discriminate against them. They make no claim that the federal funds were diverted from any actual or proposed housing project that could have been of benefit to them. In short, they allege no specific, personal, adverse results whatsoever from the grants for sewer and park construction.

The Act, properly understood, eliminates any standing of the individual plaintiffs Jordan and Mauldin. Neither

are they in the zone of interests protected by the Act nor can they allege any injury in fact. The Court's intervention will confer on them no tangible personal benefit. They have no standing.

E. Who Would Have Standing?

Having demonstrated that the law and the record in this case afford no support for the standing of *these* plaintiffs on *these* facts in *this* case under *this* Act, appellants have done what they are required to do, and can close. They are not content to do so, however; for they wish to ensure that this Court does not misconstrue their argument as meaning no one has any standing to challenge what plaintiffs say was done here. Proper parties, they submit, would have standing; and at oral argument they hypothecated just such parties. In response to a question from Judge Meskill as to who *would* have standing here, counsel for appellants responded, in substance: any "lower income person" residing in the town, or one who lived outside the town but worked in the town or was going to be working in the town. These sorts of people, counsel stated, clearly are those "residing in or expected to reside in" the town who would be affected, who arguably would suffer direct, personal injury from any statutory infractions, who would or could receive tangible personal benefits from court intervention.

On January 11, 1977, the Supreme Court, in its most recent standing opinion, found just such a person to possess the requisite standing. In *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation,* 45 U.S.L.W. 4073, a case involving, *inter alia,* racial discrimination, petitioners challenged the standing of the individual plaintiffs. One of them was a man named Ransom. In finding Ransom did have standing, the Court stated as follows:

> Respondent Ransom, a Negro works at the Honeywell factory in Arlington Heights and lives approxi-

> mately 20 miles away in Evanston in a 5-room house with his mother and his son. The complaint alleged that he seeks and would qualify for the housing MHDC wants to build in Arlington Heights. Ransom testified at trial that if Lincoln Green were built he would probably move there, since it is closer to his job.
>
> The injury Ransom asserts is that his quest for housing nearer his employment has been thwarted by official action that is racially discriminatory. If a court grants the relief he seeks, there is at least a "substantial probability" *Warth* v. *Seldin,* 422 U.S., at 504, that the Lincoln Green project will materialize, affording Ransom the housing opportunity he desires in Arlington Heights. His is not a generalized grievance. Instead, as we suggested in *Warth, id.,* at 507, 508 n. 18, it focuses on a particular project and is not dependent on speculation about the possible actions of third parties not before the court. See *id.,* at 505; *Simon* v. *Eastern Kentucky Welfare Rights Org.,* 426 U.S. at 41-42. Unlike the individual plaintiffs in *Warth,* Ransom has adequately averred an "actionable causal relationship" between Arlington Heights' zoning practices and his asserted injury. *Warth* v. *Seldin,* 422 U.S., at 507. We therefore proceed to the merits.
>
> *Id.,* at 4077

(In the preceding paragraph, the court also reiterated that "In the ordinary case, a party is denied standing to assert the rights of third persons." *Id.,* at 4076).

We have no Ransom in the case at bar. If we did, he would have standing. What we have are two Hartford residents who claim no connection whatsoever with the three defendant towns whose applications they seek to affect. They do not and will not work there. They do not and will not live there. What is done there can and will have no effect upon them. They have no standing.

Three Questions Posed by the Court

Appellants have been asked by the Court to address themselves to three particular questions.

1. "Whether in fact the towns have satisfied the expected to reside requirement for the year in question, fiscal year 1975."

2. "If so, have they reapplied to the lower court for modification of the decree as set forth at the end of the panel majority's opinion?"

3. "If not, what has happened to the funds?"

The Towns of Glastonbury and West Hartford do not know whether they have satisfied the "expected to reside" requirement for fiscal year 1975. At the same time that they took this appeal, and without waiving their right to pursue this appeal to conclusion, these two towns out of financial necessity also refiled their first-year applications with HUD. In those refiled applications they each included an "expected to reside" figure computed for their towns by HUD.

They cannot state that it is satisfactory to plaintiffs in this action. They cannot state that it would be satisfactory to others who, claiming the same standing as plaintiffs herein, might seek to challenge its accuracy or adequacy.

As of this writing HUD has not officially informed Glastonbury or West Hartford of its final approval of these revised first year applications. Therefore, the occasion for returning to the trial court for modification of its decree has not yet arrived. If it does arrive, these towns have serious questions as to the jurisdiction of the trial court to modify the decree if the decree was improperly issued in the first instance and is therefore a legal

nullity. These towns also do not know whether their figures might be attacked by others, not yet plaintiffs, who in reliance upon plaintiffs' theory of standing, might seek to challenge these new "expected to reside" figures.

Finally Glastonbury and West Hartford do not know what has happened to the funds. *They* were enjoined from drawing upon those funds. The Treasury Department was not enjoined from doing anything with them, however. We have *assumed* (and hope) that it is holding these funds pending a resolution of this action.

The Town of East Hartford will respond to these questions in a separate brief.

Conclusion

In the main brief we have presented our arguments in greater detail, and we invite the court's attention to them. The heart and soul of this appeal remains, however, as it has always been, standing: can *these* plaintiffs on *these* facts sue *these* defendants under *this* Act? The decisions of our Supreme Court and *Evans* v. *Lynn,* compel the conclusion that they cannot. These plaintiffs, through a full trial on the merits, have failed totally to adduce a scintilla of evidence supporting their right to sue these defendants. In the face of this gaping void, and the clear commands of established principles of law, the decision below must be reversed.

In deciding to reverse the decision below, the severe economic necessities which compelled two of these appellants simultaneously with this appeal to file revised first-year applications with HUD should be of no moment. For if it were, and if the possibility that approval of those revised applications and trial court lifting of the injunctions were considered as mooting the case, these plaintiffs' and the future plaintiffs' course would be clear. Henceforth

they would cite the panel's or trial court's decision as precedent for their standing, bring suits of this sort at will, hope to persuade a trial court to find in their favor; and then, secure in the knowledge that sheer economic necessity would compel defendants to explore every path that might lead to their receipt of the funds, they would either invoke mootness arguments or stall appellate proceedings until defendants' revised applications had been granted and then claim mootness. Thus, by economic muscle they would insulate erroneous decisions from review. While the issue of mootness does *not* affect the case at bar (East Hartford, for one thing, never filed a revised application), if it did, this Court should recognize this case as one of those exceptions to the rule wherein the dispute between the parties is "capable of repetition, yet evading review". *Nebraska Press Association* v. *Stuart,* 44 U.S.L.W. 5149 (June 30, 1976). For there is every reason to believe that plaintiffs or their imitators with equally infirm standing will not long tarry in bringing similar suits on future applications by these defendants under this or analogous statutes.

It is especially appropriate for this Court to address the central issue of plaintiffs' standing in this case, because it did so in *Evans* v. *Lynn.* Yet in *Evans* v. *Lynn,* not only had the challenged grants been disbursed to the defendant Town of New Castle by the time of the rehearing en banc; but the projects involved had been fully or substantially constructed and were operational, as New Castle pointed out to this Court in its brief on rehearing (page 49n). If ever a case was susceptible of disposition on mootness grounds, *Evans* was it. In the case at bar, not only is East Hartford not affected by any possibility of mootness; but the other two towns stand at this point in a similar posture and in any event could not conceivably complete their community development projects, as New Castle had, soon even *if* they received the funds today.

The judgment should be reversed and the injunction dissolved.

Respectfully submitted,

RALPH G. ELLIOT
ALCORN, BAKEWELL & SMITH
Attorney for Defendant-Appellant
Town of Glastonbury
One American Row
Hartford, Connecticut 06103

JOHN J. LANGENBACH
Corporation Counsel
Attorney for Defendant-Appellant
Town of West Hartford
Town Hall
West Hartford, Connecticut

JAMES A. WADE
ROBINSON, ROBINSON & COLE
Attorney for Defendant-Appellant
Town of East Hartford
799 Main Street
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Defendants.

State of New York,
County of New York,
City of New York—ss.:

IRVING LIGHTMAN being duly sworn, deposes and says that he is over the age of 18 years. That on the 28th day of February, 1977, he served two copies of the Joint Brief of Defendants-Appellants on See attached list

the attorneys for the see attached list by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a Branch Post Office regularly maintained by the Government of the United States at 90 Church Street, Borough of Manhattan, City of New York, directed to said attorneys at No. See attached list ( ) N. Y., that being the address designated by them for that purpose upon the preceding papers in this action.

Irving Lightman

Sworn to before me this
28th day of February, 1977.

Courtney J. Brown
COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1978

Mary R. Hennessey
Attorney for Plaintiffs-Appellees
Mauldin and Jordan
75 Elm Street
Hartford, Connecticut 06103

Barry S. Zitser
Attorney for Plaintiff-Appellee
City of Hartford
550 Main Street
Hartford, Connecticut 06106

One and timely service of TWO copies
of the within BRIEF is hereby
admitted this 1st day of MARCH 1977

Richard D. Bellman

Attorney for APPELLEE